PRESTON v. SALEM IMPROVEMENT COMPANY.*

Virginia Court of Appeals: At Wytheville.

(July 11, 1895.)

1. PLEADING—*Motion to recover money—issue—oral statement—trial by jury.* In a proceeding by motion to recover money under section 3211 of the Code, in order to entitle the defendants to a trial by jury, as provided by section 3213 of the Code, an issue must be made up. This issue may be tendered by a plea, or by an informal statement in writing of the grounds of defence. A mere oral statement is not sufficient; and in cases where the statute requires the plea to be verified by affidavit, that requirement of the statute must be complied with.

Writ of error to a judgment of the Circuit Court of Washington county, pronounced April 6, 1894, in a proceeding by motion wherein the defendant in error was the plaintiff, and the plaintiff in error was the defendant. *Affirmed.*

This was a proceeding by motion under section 3211 of the Code, to recover a judgment against the defendant on two negotiable notes for the sum of $200 each, subject to a credit for $200.15 endorsed on one of the notes. The defendant appeared, by counsel, but declined to plead or tender an issue, and asked for a jury "to try the case." This was refused, and a judgment was rendered by the court in favor of the plaintiff for the amount of the two notes and interest and costs, subject to the credit aforesaid.

The opinion states the case.

Daniel Trigg, for the plaintiff in error.

J. J. Stuart, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This case does not involve the amount required by statute to entitle the plaintiff to a hearing by this court. It is, however, contended that there is a constitutional question involved which brings the case within the jurisdiction of this court.

The question presented is, can a defendant, in a motion under section 3211, Code of Virginia, 1887, claim a trial by a jury, as of right, without tendering an issue?

* Reported by M. P. Burks, State Reporter.

When the case was called in the court below, the defendant declined to plead or tender any issue of fact, claiming the right, as this was a summary proceeding, to go to trial, without any formal pleadings, and to produce orally in the progress of the trial any defenses he might have. The court declined to allow a jury to be worn until and unless some issue of fact was joined. The parties th reupon submitted the matters of law and fact arising in the case to the determination and judgment of the court, but without waiving the defendant's exception to the ruling of the court.

The contention is that this it is a summary proceeding provided by statute, and that it was not necessary, under section 3211, to plead, or make up an issue of fact for the jury, but that the defendant was entitled to a trial by a jury without an issue, and that it was a denial of his constitutional rights not to accord him a jury, without his tendering an issue.

The object of section 3211 of the Code was to afford a more speedy remedy for the enforcement of contracts, but it was not contemplated that all the rules of pleading were to be abrogated thereby. Section 3213 of the Code expressly provides that "on a motion where an issue of fact is joined, and either party desires it, or where, in the opinion of the court, it is proper, a jury shall be impaneled, unless the case be one in which the recovery is limited to an amount not greater than twenty dollars, exclusive of interest."

The general rule applying to all actions will not sustain a judgment given upon a verdict, rendered as upon the trial of an issue, where no issue has been joined. No verdict can be rendered, or judgment entered thereon, in any case, unless issue shall have first been joined on the pleadings. 1 Bart. L. Prac. 476 ; 4 Minor, Inst. pt. 1, p. 851. It would be error in the circuit court to enter up a judgment on the verdict of a jury in any case where no issue had been joined, or no plea filed by the defendant. Any such judgment would, for that reason only, be reversed. The cases are numerous, in this and other States, where verdicts and judgments have been set aside by the appellate court merely because the verdict was rendered when no issue had been joined. *Stevens v. Taliaferro*, 1 Wash. (Va.) 155; *McMillion v. Dobbins*, 9 Leigh. 422; *Rowans v. Givens*, 10 Gratt. 250; *Ruffner v. Hill*, 21 W. Va. 152.

The better practice in proceedings by motion would be to make up the issue to be tried by the jury by filing such formal plea as would be suitable had the action been by declaration, according to the form at

common law. Inasmuch, however, as the object of this proceeding by motion under section 3211 was to give suitors a plain and summary proceeding for the recovery of judgments, and it is but in accordance with the spirit of this flexible proceeding by motion to permit the defendant to make his defence by such informal pleas or statement in writing as will state his defence and make up the issue to be tried, this latter practice is permissible, except in all cases where the statute requires the plea to be verified by affidavit. In such cases that requirement of the statute must always be complied with.

In the case at bar, the defendant was deprived of no constitutional right in being required to make up an issue of fact before the jury was impaneled. He could have secured this privilege by filing the formal but simple plea of *nil debet*, or by filing a statement in writing of the grounds of his defence sufficiently explicit to make up the issue.

For the foregoing reasons, the court is of opinion that there is no error in the judgment complained of, and it is affirmed.

Affirmed.

BY THE EDITOR.—It does not appear from the opinion of the court what constitutional provisions the statute construed was alleged to have violated—whether they are provisions of the Constitution of the United States or of the State of Virginia, or of both. Looking to the briefs of counsel, it appears that the objection to the validity of the statute was rested alone on the ground that it was forbidden by the Seventh Amendment of the Constitution of the United States, which requires that "in suits at common law, where the matter in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

It has been decided again and again, and so often and so uniformly, by the Supreme Court of the United States and the highest courts of the States, that the first eight or ten amendments to the Constitution of the United States apply *exclusively* to the powers of the Federal Government, that it is wholly unnecessary to cite authorities to the point. It was so decided by our Court of Appeals in *Southern Express Co. v. Commonwealth at the relation of Walker*, at the late session of the court at Wytheville (a case not yet reported), and a few of the numerous decisions of the United States Supreme Court were cited in the opinion delivered by Judge Riely.

There is, however, a somewhat similar provision in the Constitution of Virginia, inserted in her first Constitution (1776), and continued thence hitherto. In our Bill of Rights, Art. 1. of the Constitution, Par. 13, it is declared "that in controversies respecting property, and in suits between man and man, the trial by jury is preferable to any other, and ought to be held sacred."

That this provision of the Virginia Constitution is not violated by the statute drawn in question would seem to be so clear that there could be no room for difference of opinion. The proceeding was by *motion* under sec. 3211 of the Code to recover judgment for money which the plaintiff was entitled to recover by *action* on the contract; and it is *expressly* provided by sec. 3213 that "in a motion, when

an issue of fact is joined, or, when in the opinion of the court it is proper, a jury shall be impaneled, unless," etc. Here the constitutional right of trial by jury is unequivocally preserved. If an *action* is brought according to the course of the common law as it was at the time the Constitution was adopted, in order to entitle either party to a jury, there must be an "issue of fact" to be tried. This "issue" is reached by formal pleading in a common law action. It can be reached in no other way in such action. In the cumulative statutory remedy by motion it may be reached in the same way, or more informally, perhaps, as suggested by the court, by the statement in writing of the grounds of defence to which the plaintiff may reply and thus make up an "issue." But, in any event, there can be no trial by jury except of an "issue of fact" made up in some way whether formally or informally. This requirement does not violate the Constitution; for it is the same that existed when the Constitution was adopted, and the statute simply does not dispense with it.

An instructive note on the general subject of such constitutional provisions may be found in 48 Am. Dec. 185-194. See also 3 Am. & Eng. Encyc. of Law, 719-722 and notes.

CAMPBELL, TRUSTEE, AND OTHERS v. MCBEE AND ANOTHER.*

Virginia Court of Appeals: At Wytheville.

(August 1, 1895.)

1. SEPARATE ESTATE UNDER ACTS OF 1877 AND 1878.—*Interest of husband—curtesy—judgment against husband.* The husband has no interest, during the lifetime of the wife, in the real estate acquired by her as a separate estate under the Act of April 4, 1877, as amended by the Act of March 14, 1878. If the wife dies intestate and the husband is entitled to curtesy, the judgment against the husband during the coverture will attach to his estate by the curtesy, but in subordination to a deed of trust made by husband and wife during the coverture.

Appeal from a decree of the Circuit Court of Wythe county, rendered March 17, 1894, in a suit in chancery wherein M. K. McBee and others were the complainants, and the appellees and others were the defendants. *Reversed.*

The opinion states the case.

Walker & Caldwell and *A. A. Campbell*, for the appellants.

J. A. Sanders and *Ro. Crockett*, for the appellees.

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* Reported by M. P Burks, State Reporter.